SUMMARY OF PUBLIC COMMENTS FOR 45-DAY PUBLIC COMMENT PERIOD AND THE BOARD'S RESPONSES

I.

Introduction

The State Personnel Board (Board) proposes to amend section 242 of Title 2 of the California Code of Regulations (CCR). A 45-day public comment period on this rulemaking action was held from August 14, 2020, through September 28, 2020. A public hearing was held on September 29, 2020. The comments received during the 45-day public comment period were taken under submission and considered. A summary of those comments and the Board's responses are below.

II.

Summary of Written Comments from Jill O'Connell, Chief, Human Resource Services Division, Employment Development Department (EDD)

Comment: Amended § 242, subdivision (a).

The EDD recommends allowing promotions in place while an employee is serving a probationary period in their current position. EDD asserts that not allowing a probationary status employee to promote in place will require the hiring manager to spend resources recruiting, hiring and training a new employee and result in retention problems.

Response

The Board declines to make the recommended change. The proposed amendment clarifies that promotions in place are only allowed once the employee has attained permanent status in the classification. This proposed amendment is consistent with the requirement that appointments must be based on merit and fitness. Specifically, subdivision (a) requires that the appointing power demonstrate that the employee possesses the ability and willingness to succeed at the higher level classification. The successful completion of a probationary period provides a reasonable amount of time for an appointing power to evaluate and determine whether or not the employee has in fact demonstrated satisfactory or higher job performance in the classification, and therefore meets the requirement of subdivision (a).

III.

Summary of Written Comments from Linda Flanagan

Comment: Amended § 242, subdivision (a)(4).

Ms. Flanagan asserts that adding subdivision (a)(4) will cause hardship to departments in situations in which the scope of duties of a filled position becomes more complex in terms of the policy role or staffing ratio, such as a Staff Services Manager (SSM) I or II. She states that subdivision (a)(4) will prevent departments from legally promoting in place an SSM I to an SSM II (Managerial), or an SSM II (Supervisory) to an SSM III (Managerial), potentially exposing the department to an out-of-class grievance.

Response

The Board declines to make the recommended change. Promotions in place, by definition, are promotions within the *same* job. The intent of proposed subdivision (a)(4) is to make clear that promotions from supervisory to managerial classifications require a competitive selection process because supervisory and managerial jobs are distinctly different in terms of the level of duties, responsibilities, knowledge, skills, abilities, and competencies required. Additionally, the intent of section 242 is not to correct misallocated positions. It is the responsibility of the appointing power to ensure that assigned duties are appropriate for the classification of the employee's position.

IV.

Summary of Written Comments from Melissa Harpster

Comment: Amended § 242 (a)(4).

Ms. Harpster believes that subdivision (a)(4) will cause hardship to state agencies in instances in which a filled supervisory position takes on increased duties and staff oversight. As a result, HR would be responsible for finding an alternate solution to avoid an out of class grievance, and staff retention and upward mobility efforts will be hindered.

Response

Please see III., Written Comments, Response (*ante*, at p. 2). Additionally, the proposed amendment does not hinder staff retention or upward mobility efforts. If the level of duties and responsibilities supports a higher level managerial classification, the

department may hire or promote at that level after conducting a fair and competitive hiring process.

V.

Summary of Written Comments from Nicole Heeder, Senior Attorney, SEIU Local 100

Comment: Amended § 242, subdivision (b).

The SEIU believes that for preservation of the record and to benefit the employees in question, the Board should require departments to put the notice in writing.

SEIU asserts that when management is making significant decisions about an employee's upward mobility the decision should be made in writing to the affected employee. The proposed amendment increases the burden on employees and guardians of their rights by withholding pertinent documentation. Placing the onus on employees to request a written notification of their non-selection is problematic because the average employee will be unaware of their right to contemporaneously request written documentation, and the burden does not take into account that an employee may not have any reason at the time to question the employer's decision. Should the employee fail to make such a request, the likelihood that a department will provide an employee with consistent information later is miniscule.

SEIU proposes a requirement that, when the employer gives verbal notice of non-selection, the employer must also notify the employee of their right to request that the reasons be provided in writing.

Response

The Board thanks the SEIU for their comment and will amend section 242 to require that the appointing power inform all eligible employees not selected in writing of the reasons for the decision. However, in order to address the Board's concern that documentation in an employee's official personnel file reflecting the reasons for denying a promotion in place may be perceived by prospective employers as a negative performance evaluation, subdivision (b) is amended to prohibit the documentation from being placed in the employee's official personnel file."

VI.

Summary of Written Comments from J. Edgar Boyd, Pastor, and Alice Huffman, President (NAACP), Co-Chairs of the African American Empowerment Council (AAEC)

Comment 1: Amended § 242, subdivision (a).

The AAEC argues that two exclusions included in the proposed amendments to section 242, subdivision (a), will limit the upward mobility of active civil servants, institute barriers to the personal and career development of employees by focusing on the process of examination rather than objective performance, and impede the state's ability to effectively and economically administer programs with qualified and motivated employees.

Specifically, the AAEC believes the Board's added clarification that promotions in place apply only to employees with "permanent civil service status in their current position" unnecessarily excludes employees from promotion in place.

Additionally, the AAEC expresses concern that prohibiting promotions in place from rank-and-file to supervisory, and from supervisory to management classifications, despite an employee currently fulfilling those responsibilities competently, as is specified in the rule, appears only to limit an employee's ability to promote to the next level when it is recognized that the employee has attained qualifications.

Response 1

The Board's response to AAEC's concern regarding the restriction on promotions in place to only employees with "permanent civil service status in their current position" is addressed in Section II., Written Comments, Response (*ante*, at p. 1). The requirement that an employee complete the 6-month or 12-month probationary period in their current position in order to acquire permanent status prior to being considered for promotion in place does not constitute a significant barrier to an employee's career development or upward mobility opportunities. However, it does ensure that the appointing power has a reasonable amount of time to objectively assess, and most importantly, document, an employee's performance in order to transparently support and justify an employee's promotion in place. This requirement is intended to reduce instances of favoritism or nepotism wherein employees are quickly advanced in secret prior to adequately demonstrating an employee's satisfactory or higher job performance in their current position and ability to succeed at the higher level classification.

With respect to the prohibition against promotions in place between rank and file and supervisory or supervisory to managerial, such a prohibition already exists pursuant to

Human Resources Manual Policy 1208. This amendment would merely clarify that prohibition in regulation. The reason that promotions in place are not permissible from rank and file to supervisory or supervisory to managerial is that they do not meet the definition of “in place.” In other words, they are not promotions to a higher level within the *same* job. Supervisory and managerial classifications have distinctly different duties, responsibilities, knowledge, skills, abilities, and competencies from each other and from rank and file classifications, and therefore are *different* jobs than the incumbent’s current job. Therefore, a competitive promotional process is required in order to give all eligible employees and applicants an opportunity to be considered for the promotion, especially since there are a limited number of supervisory and managerial positions allocated to each program.

The requirement that appointing powers fill supervisory or managerial vacancies via a competitive selection process should provide more opportunities for qualified and motivated employees to compete and be considered for higher level promotional opportunities. An open and transparent competitive promotional process helps to reduce favoritism and cronyism, by preventing hiring managers from handpicking their favorite employees for limited promotional opportunities.

Current section 242 ensures a fair, competitive, and objective policy for promotions in place by basing a candidate’s promotion in place on both their performance in an exam and their performance in their current classification. This is consistent with the merit principle. Moreover, current section 242 includes several requirements that ensure transparency and efficiency during this process. For example, the appointing power must document and maintain the reasons why the selected employee was chosen for the promotion in place. Moreover, the current regulation also requires the supervisor to meet with those eligible employees who are not selected for promotion and provide them the reasons for their non-selection so that they can obtain the necessary knowledge, skills, abilities and competencies to be promoted in the future. In other words, section 242 makes it easier for eligible employees to promote up within rank-and-file classifications, while also requiring that the appointing power document the merit-based reasons for the promotion in place and maintain transparency throughout the process.

With respect to the assertion that employees already performing the duties of the promotional class in their current position qualifies them for advancement, employees in such instances must be working in an approved out-of-class assignment.

While employees may work out-of-class as specified in Board regulations, using this practice as a means to justify a promotion in place only for that employee, when other employees may also be eligible for promotion, raises concerns of favoritism and inequity

in selection procedures, all of which are antithetical to the merit principle. Thus, appointing powers must ensure that out-of-class assignments are proper and in compliance with laws, rules, and policies. Authorized out-of-class assignments are temporary work assignments and do not negate the requirement of an open and transparent competitive promotional process for the permanent appointment to the classification.

The amendments to section 242 do not impact a department's ability to promote its employees; rather, the amendments define an efficient and appropriate process for effectuating a promotion. If the promotion is within the employee's *same* job and all the requirements are met, the promotion can be conducted in place without a competitive process. If, however, the promotion is to a *different* job, such as a supervisor or manager job, then the department must advertise the promotion and provide all eligible employees the opportunity to compete for it.

Comment 2: Amended § 242, subdivision (b).

The AAEC states that the proposed amendment to section 242, subdivision (b), that no longer requires the appointing power to provide a written explanation to non-selected employees for promotion in place "will produce a chilling effect on employees who have been unjustly eliminated from consideration, as assigning responsibility for sufficiently documenting the selection process onto any employee would." The AAEC believes that the "removal of the written explanation requirement, left to an aggrieved employee to request as to why any candidate was not given a promotion in place, would remove a protective barrier to effectively track bias, making it more difficult to prove discriminatory, biased, or crony/nepotistic decisions."

Response II

Please see V., Written Comments, Response (*ante*, at p. 3). The Board thanks the AAEC for their comment and will amend section 242 to require that the appointing power inform all eligible employees not selected in writing of the reasons for the decision. However, in order to address the Board's concern that documentation in an employee's official personnel file reflecting the reasons for denying a promotion in place may be perceived by prospective employers as a negative performance evaluation, subdivision (b) is amended to prohibit the documentation from being placed in the employee's official personnel file.

VII.

Summary of Written Comments from Lesley Kelley, Senior Classification and Pay Consultant, Classification, Performance, and Labor Unit, Office of Human Resources, Department of Justice (DOJ)

Comment: Amended § 242, subdivision (b).

The DOJ poses questions regarding a specific scenario involving a promotion to a Business Services Officer (BSO) classification. Specifically, the DOJ asks whether a Business Services Assistant (BSA) could be promoted in place when there is an Office Technician (OT) in the unit who is also on the eligibility list, and, if so, whether the manager would be required to meet with the OT to explain why the OT was not considered.

Response

The DOJ's question relates to the implementation of the proposed regulation on specific classifications rather than on the process itself. Questions concerning implementation regarding specific classifications can be addressed to the assigned CalHR analyst once the regulations become effective.

VIII.

Summary of Written Comments from Jennifer Dong Kawate, Chief, Human Resources Office, Department of Water Resources (DWR)

Comment 1: Amended § 242, subdivision (a).

The DWR believes that the addition of "in their current position" would prohibit employees with probationary status from promoting in place, and that it will take individuals that start with the State in lower classifications and highly qualified individuals longer to move through classifications. The department recommends that the text be modified to include the following italicized language: "…an employee with permanent *or probationary* civil service status in their current position . . . "

Response 1

Please see II., Written Comments, Response (*ante*, at p. 1).

Comment 2: Defining "Promotion in Place"

The DWR feels that the definition of "promotion in place" is very broad, and, therefore, the proposed regulatory changes could be misinterpreted. The regulatory change would prohibit employees who backfilled a position on a limited-term basis because the previous incumbent accepted a Training and Development (T & D) assignment or another limited-term position from becoming permanent. Changing the tenure from limited term to permanent in place would be considered a "promotion in place" to a permanent position. Based on the Initial Statement of Reasons, these regulations would never allow limited-term employees to become permanent without re-advertising the position. The department recommends that the regulations define "promotion in place" or allow promotions in place when the position was backfilled behind a previous employee who accepted a T & D assignment or limited-term appointment and has been made permanent.

Response 2

The Board declines to make the recommended change. The Board believes the definition of promotion in place is clear. With respect to the DWR's example, current section 249.1.1, subdivision (c), addresses the conversion of a limited term appointment to a permanent appointment.

IX.

Summary of Written Comments from Christina Martinez, Human Resources, Personnel Officer, California State Teachers' Retirement System (CalSTRS)

Comment: Amended § 242, subdivision (a)(3).

The CalSTRS asserts that the proposed changes will prohibit an Associate Governmental Program Analyst (AGPA) to promote in place to an SSM I (Specialist), which is permissible per CalHR's Rule 242 Frequently Asked Questions. Similarly, CalSTRS asserts that the proposed changes will impact the ability for an Information Technology Specialist (ITS) II to promote in place to an ITS III. The II is rank-and-file and the ITS III is managerial but does not supervise staff.

Response

The Board thanks the CalSTRS for their comment and will amend section 242 to allow appointing powers to promote employees in place from rank and file or supervisory positions to higher level specialist positions.

X.

Summary of Written Comments from Olivia Trejo, Section Chief, Office of Human Resources, Department of Consumer Affairs (DCA)

Comment: Amended § 242 (a).

The DCA believes that "*in their current position*" can be interpreted to mean that someone who is currently serving a probationary period and has already gained permanent civil service status elsewhere is not able to be promoted-in-place until after they pass probation in their current position. However, the DCA asserts that some may interpret the added language to only apply to those employees with limited-term or TAU tenures. The DCA proposes that this be clarified so the intent of the added language is applied correctly and consistently.

Response

Please see II., Written Comments, Response (*ante*, at p. 2).

XI.

Summary of Written Comments from Georgia Williams, Business Tax Representative (BTR), California Department of Tax & Fee Administration (CDTFA)

Comment: Amended § 242, subdivision (a).

Ms. Williams, a BTR at the CDTFA, states that qualified rank and file employees should be allowed to promote in place to supervisory positions on a case by case basis because they often possess the required experience and education needed. Ms. Williams expresses concern that the amended regulation prohibiting rank and file employees from promoting in place to supervisory positions both discourages and undervalues hard working, seasoned, and competent employees by limiting their promotional opportunities. Ms. Williams recommends that the Board change the requirements of supervisory positions in order to allow rank and file employees to promote. As an example, Ms. Williams provides her own experience as a BTR at the CDTFA. She explains that she has been a BTR for 17 years and the only position she can promote to that falls within her class series is a Business Taxes Compliance Specialist (BTSC) and vacancies for this position are uncommon. Ms. Williams refers to the Board's changes made to the alternate range criteria of the BTR wherein the Board allowed persons to be immediately appointed to Range C of the BTR classification when they meet the educational requirements giving college graduates an advantage

over experienced employees. She believes the Board could make similar changes to the minimum qualifications of alternate ranges of supervisor classifications in order to encourage the promotion of rank and file employees into supervisory positions.

Response

Please see the following: III, Written Comments, Response (ante, at p.2); IV, Written Comments, Response (ante, at p.2); and, VI., Written Comments, Response I (*ante*, at p. 4).

Ms. Williams makes a compelling argument supporting class consolidation in order to broaden current state employees' promotional opportunities and streamline state exam and hiring processes. However, the narrow purpose of section 242 is to ensure a fair, transparent, efficient and merit-based process for effectuating a promotion. As such, Ms. Williams' concerns regarding the limited career paths of specialized state classification series are not relevant to this regulatory action.

XII.

Additional Note I:

The CalHR has posed a question related to the appropriateness of promotions in place between classifications that do not share the same job functions. For instance, the CalHR posed a scenario asking if current section 242 permits an Office Technician to be promoted in place to an Associate Governmental Program Analyst. According to current section 242, subdivision (a)(1), in order for an employee to be promoted in place, he or she must have "*shown the ability* [emphasis added] and willingness to succeed at the higher level classification." In this case, an Office Technician's primary job function is to perform clerical work, whereas an Associate Governmental Program Analyst's primary job function is to perform complex analytical work with a high degree of independence. As such, an employee serving as an Office Technician, chiefly performing clerical work, *would be unable to demonstrate the ability* to perform analytical work especially at the Associate Governmental Program Analyst level and, therefore, could not be promoted in place. In summary, as stated in Comment III, Response (*ante*, at pg. 2), promotions in place, by definition, are promotions within the *same* job and when the classifications are distinctly different in terms of the level of duties, responsibilities, knowledge, skills, abilities, and competencies; a competitive selection process is required.

Despite the Board's belief that current section 242, subdivision (a)(1), clearly prohibits promotions in place between two classifications that do not share the same primary job

functions, the intent of proposed regulatory changes is to clarify and simplify Board rules that are misunderstood or confusing. As such, an additional criterion for promotions in place has been added requiring that "The employee's "from" class has the same job functions as the "to" class but at a higher level and the appointing power documents how the promotion in place meets this criteria."

Additional Note II:

On October 22, 2020, the California Supreme Court issued an administrative order approving New Rule 9.49, which implemented a Provisional Licensure Program (PLP) for 2020 law school graduates. The current program allows eligible 2020 law school graduates[1] to practice law as provisionally licensed lawyers[2] under the supervision of fully licensed lawyers who meet the requirements of the rule and who agree to assume professional responsibility over the work of the provisionally licensed lawyers.

On January 28, 2021, the California Supreme Court issued an additional administrative order approving Rule 9.49.1, expanding the PLP. The amended rule includes individuals who scored 1390 or higher on any California Bar Exam administered between July 2015 and February 2020, as determined by the first read score or final score, regardless of year of law school graduation or year satisfying the educational requirements to sit for the bar exam. Those eligible for the expanded program will not need to retake a bar exam if they complete 300 hours of supervised legal practice in the PLP and fulfill all other requirements of the amended rule.

In light of these administrative orders and in an effort to facilitate the hiring and promotion of qualified and competent law school graduates to fill vacant entry-level attorney positions, the Board proposes an exception to section 242 which allows law school graduates in the PLP to be promoted in place without permanent or probationary status. The purpose of this exception is to ensure that law school graduates hired as

[1] A person who became eligible to sit for the California Bar Examination under Business and Professions Code sections 6060 and 6061 between December 1, 2019 and December 31, 2020, either by graduating from a qualifying law school with a juris doctor (J.D.) or master of laws (LLM) degree during that time period, or by otherwise meeting the legal education requirements of Business and Professions Code sections 6060 and 6061 during that time period.

[2] A provisionally licensed lawyer is allowed to provide a broad array of legal services for clients, including appearing before a court, drafting legal documents, contracts or transactional documents, and pleadings, engaging in negotiations and settlement discussions, and providing other legal advice, provided that the work is performed under the supervision of a qualifying supervising lawyer. The limits on what a provisionally licensed lawyer can do, or what needs to be done under direct versus general supervision, are largely left to the supervising attorney to determine the readiness of the provisionally licensed lawyer.

Graduate Legal Assistants serving as provisionally licensed attorneys may more easily promote in place when they are admitted to the California Bar under the criteria outlined in the California Supreme Court administrative orders as long as all other criteria under section 242 are met. Without this exception, departments would face unnecessary barriers to promote otherwise qualified employees such as forcing graduate legal assistants to complete a 12-month probationary period.

As such, the Board will add subdivision (e) which includes the following added text, "Law school graduates currently enrolled in the State Bar Provisional Licensure Program in accordance with California Supreme Court administrative orders 9.49 and/or 9.49.1, may promote in place without acquiring permanent or probationary status in their current position where all other elements of subdivision (a) are met."

XIII.

Conclusion

The Board appreciates the feedback it received regarding this proposed regulatory package. The modified text with the changes clearly indicated are available to the public as stated in the Notice of Modification to Text of Proposed Regulation.